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OPINING ON DEATH: WITNESS SENTENCE RECOMMENDATIONS IN CAPITAL TRIALS

WAYNE A. LOGAN*

Abstract: *Despite the Supreme Court's command that capital prosecutions be free of undue arbitrary and capricious influences, the trials themselves are becoming increasingly emotional and personalized. This Article addresses a key outgrowth of this evolution: the increasingly common practice of witnesses opining on whether a defendant should be put to death, despite the Court's apparent prohibition of such testimony. The Article addresses why this practice is likely to continue, and advances several reasons why the Supreme Court should impose an unequivocal bar on sentence opinion testimony in capital trials.*

*Fish not, with this melancholy bait,
For this fool gudgeon, this opinion.*

—WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 1, sc. 1.

INTRODUCTION

Spurred by the politically potent victims' rights movement, the U.S. criminal justice system has embarked upon a sustained and comprehensive effort to lessen the alienation felt by the victims of crime. One clear upshot of this evolution is that criminal prosecutions have become more personalized and "compensation" oriented and less consciously oriented toward vindicating society's traditional retributive and deterrent goals.¹

Given this evolution, and the profound personal consequences of murder, it should come as no surprise that death penalty prosecutions have also become more personalized in recent times.² As one com-

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¹ See GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* 200-01 (1995).

² The Wyoming capital prosecution of Aaron McKinney for the murder of Matthew Shepard provided an instructive recent example of this personalization. After convicting McKinney for his part in the gruesome murder, the jury was preparing to hear evidence on whether he should be put to death. That morning, however, the grieving parents of Mr.

mentator has suggested: "[i]n the past, capital sentencing pitted the defendant against the State In the new paradigmatic sentencing hearing, the capital defendant now encounters an even more formidable opponent: the person whose death made her eligible for the death penalty, the capital victim."³ Although this shift stems from several key developments, the proliferation of "victim impact evidence" in capital trials, as permitted by the United States Supreme Court's 1991 decision in *Payne v. Tennessee*,⁴ surely figures among the most prominent. As a result of *Payne*'s lifting of the per se constitutional bar against victim impact evidence, the survivors of murder victims now regularly provide highly emotional, gripping testimony of the manifold losses suffered as a result of defendants' murderous acts.⁵

This Article examines a distinct, yet closely related form of witness input at sentencing, namely, witnesses' opinions on whether the convicted capital defendant should be put to death. The Article first surveys the Supreme Court's case law regarding the permissibility of sentence opinion testimony in capital trials, which ostensibly prohibits its admission. As will be evident, however, the prohibition is frequently being honored in the breach, with courts across the land now either expressing uncertainty over the continued existence of the prohibition or upholding admission of sentence opinion testimony on a variety of rationales. This hemorrhage, it will be argued, is likely to only accelerate in capital trials to come, especially given the obvious appeal of providing victims a "voice" in determining the fate of their assailants. Mindful of this eventuality, the Article explores why sentence opinion testimony should be prohibited in capital trials and urges that the Court adopt a bright-line rule expressly prohibiting its use.

I. THE ROLE OF WITNESSES' OPINIONS IN CAPITAL SENTENCING DECISIONS

One would presume that the sentiments of crime victims, the individuals who suffer the actual physical harm of the crime perpe-

Shepard intervened to derail the capital penalty phase and, against the wishes of the local district attorney, "granted" McKinney life. See Tom Kenworthy, "I'm Going to Grant You Life," *Parents of Slain Gay Student Agree to Prison for his Killer*, WASH. POST, Nov. 5, 1999, at A2.

³ Markus D. Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 BUFF. L. REV. 85, 86 (1993).

⁴ See 501 U.S. 808 (1991).

⁵ See generally Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143 (1999) (examining content, form and widespread use of victim impact evidence).

trated, would play a paramount role in sentencing decisions. Reality, in fact, is consistent with this presumption, as jurisdictions very often allow victims to opine on the quantum of punishment their assailants should receive.⁶ This orientation is also reflected in the American Bar Association's *Uniform Victims of Crime Act*, which directs that the court "shall" permit victims to provide their "*opinion regarding the appropriate sentence.*"⁷

In the capital sentencing realm, however, the courts have been considerably less willing to permit the sentencing authority to consider sentence opinion testimony from victims (or, more commonly, their survivors). This section focuses on this reluctance, paying particular attention to the U.S. Supreme Court's statements in recent years on the permissibility of sentence opinion testimony in capital proceedings.

A. *The Outlines of a Per Se Rule of Exclusion: Booth, Gathers, Huertas and Payne*

The Court's jurisprudence on sentence opinion testimony derives from several decisions concerning what has come to be known as "victim impact evidence."⁸ *Booth v. Maryland*, decided in 1987, marked the justices' initial foray into the area.⁹ *Booth* involved the brutal robbery-murders of two elderly victims, the Bronsteins, killed by their neighbor and his accomplice who were in search of money or property to buy heroin.¹⁰ After finding Booth guilty of both murders, the jury was read a "victim impact statement" prepared by the State Division of Probation and Parole as part of its felony presentence report.¹¹

⁶ See generally Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 69-90 (1998) (surveying proliferation of victims' rights provisions ensuring "right to be heard" at sentencing); see also generally *Randell v. State*, 846 P.2d 278, 279-80 (Nev. 1993) (allowing survivor to provide sentence recommendation in non-capital murder prosecution). In one particularly high-profile instance, a Minnesota judge permitted a sexual assault victim to determine the sentence imposed on her convicted assailant. See Bruce J. Schulte, *Victim Sentences Her Attacker: Judge Lets 65-Year-Old Pick Rapist's Punishment*, 75 A.B.A. J. 28 (Apr. 1989).

⁷ See AMERICAN BAR ASSOCIATION, *UNIFORM VICTIMS OF CRIME ACT* § 216 (1993) (emphasis added).

⁸ See generally Logan, *supra* note 5, at 150-69 (examining varieties and content of victim impact evidence).

⁹ See 482 U.S. 496 (1987).

¹⁰ See *id.* at 498.

¹¹ Under Maryland law, the contents of the report could be read to the jury or the survivors could provide live testimony. See *id.* at 499, 501. At the request of Booth's lawyer, who

The report was based on interviews with the decedents' son, daughter, son-in-law, and granddaughter, and contained two basic kinds of information.

First, the report conveyed at length the survivors' descriptions of the positive personal characteristics of the elderly victims and the emotional impact of the murders on the family as a whole.¹² Writing for the majority, Justice Powell condemned the evidence as "irrelevant" and rejected the State of Maryland's assertion that such information permitted jurors to assess the "gravity" of the offense.¹³ According to Justice Powell, the evidence in effect refocused the sentencing decision from the defendant and his criminal act to "the character and reputation of the victim and the effect on his family," despite the fact that the defendant was wholly unaware of the personal qualities and worth of the victim.¹⁴ In so doing, Justice Powell concluded, the State created "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner" in violation of the Eighth Amendment.¹⁵

Second, the report contained two related forms of testimony: (1) family members' characterizations of the crime (characterization testimony) and (2) their opinions as to the sentence the defendant should receive (sentence opinion testimony).¹⁶ As to the characterization testimony, the Bronsteins' son told the jury that his parents had been "butchered like animals." The daughter added that "animals wouldn't do this."¹⁷ The sentence opinion testimony offered, however, was considerably more subtle. The son simply opined that he did not "think anyone should be able to do something like [the murders] and get away with it."¹⁸ For her part, the daughter related that she did not "feel that the people who [committed the murders] could ever be rehabilitated and [that] she [did not] want them to be able to do this again or put another family through this."¹⁹ In short, the family wanted "swift and just punishment."²⁰

feared that the "use of live testimony would increase the inflammatory effect of the information," the prosecution read the statement to the jury. *Id.* at 501.

¹² *See id.* at 499-500.

¹³ *Id.* at 504.

¹⁴ *Booth*, 482 U.S. at 504.

¹⁵ *Id.* at 503.

¹⁶ *See id.*

¹⁷ *Id.* at 508.

¹⁸ *Id.*

¹⁹ *Booth*, 482 U.S. at 508.

²⁰ *Id.*

Justice Powell was sympathetic to the survivors yet clear in his condemnation of both forms of testimony:

One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors are generally aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant The admission of these emotionally-charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision making we require in capital cases.²¹

The *Booth* Court thus erected a per se Eighth Amendment bar against victim impact evidence in capital trials. The Court, however, was at pains to state that its prohibition did not extend to non-capital trials, on the reasoning that "death is a 'punishment different from all other sanctions,' and that therefore the considerations that inform the sentencing decision may be different from those that might be relevant to other liability or punishment determinations."²² The dissents, although disagreeing with the majority's preclusion of victim impact evidence more generally, seemingly agreed that sentence opinion testimony was impermissible.²³

²¹ *Id.*

²² *Id.* at 509 n.12 (citing *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976)). Writing in dissent, Justice White questioned why victim impact evidence should be precluded in capital trials but allowed in non-capital trials. According to Justice White:

If punishment can be enhanced in noncapital cases on the basis of the harm caused, irrespective of the offender's specific intention to cause such harm, I fail to see why the same approach is unconstitutional in death cases. If anything I would think that victim impact statements are particularly appropriate in capital sentencing hearings: the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in

Id. at 516-17 (White, J., dissenting).

²³ Both Justices White and Scalia filed dissents, each joined by the Chief Justice and Justice O'Connor, as well as each other. Justice White expressed his position on the question of sentence opinion testimony in somewhat ambiguous terms, stating:

To the extent that the Court determines that in this case it was inappropriate to allow the victims' family to express their opinions on, for example, whether petitioner could be rehabilitated, that is obviously not an inherent fault in all victim impact statements and no reason to declare the practice of admitting such statements at capital sentencing hearings per se unconstitutional.

Only two years later, in 1989, in *South Carolina v. Gathers*,²⁴ the Court was faced with yet another Eighth Amendment claim against the use of victim impact evidence in the penalty phase of a capital trial. This time the Court addressed the propriety of an emotional closing argument by the prosecution that praised at length the religiosity and civic-mindedness of the decedent, a self-styled "Reverend Minister."²⁵ The prosecutor told the jury that "[n]o one takes any pleasure from it but the proof cries out from the grave in this case."²⁶ Despite the not-so-veiled death recommendation conveyed by the prosecutor, the *Gathers* majority inferred that the prosecutor's remarks related only to the victim's "personal characteristics."²⁷ Although not testimony from survivors, the Court considered the statements "indistinguishable" from those statements condemned in *Booth* and hence impermissible under the Eighth Amendment.²⁸

The following term, the Court agreed to hear *Ohio v. Huertas*, providing the justices with an opportunity to revisit the *Booth* prohibition of sentence opinion testimony under facts that were even more clear-cut than those in *Booth*.²⁹ In a 1986 trial conducted before *Booth* and *Gathers* were decided, Huertas was convicted of the stabbing death of a male friend as a result of a romantic triangle.³⁰ At sentencing, the State proffered each type of impact evidence condemned in *Booth*.³¹ As to the sentence opinion testimony, the victim's father was directly asked by the prosecutor whether he thought Huertas should receive the death penalty. Over defense objection, the father replied, "He took a life. Yes, I do."³² A presentence report, also admitted into evidence, reiterated the father's view that Huertas should be sen-

Booth, 482 U.S. at 518-19 (White, J., dissenting). Justice Scalia altogether failed to address sentence opinion testimony, instead condemning the five-member majority for its per se exclusion of victim impact evidence in capital trials. See *id.* at 519-21 (Scalia, J., dissenting).

²⁴ 490 U.S. 805 (1989).

²⁵ *Id.* at 808-10.

²⁶ *Id.* at 809.

²⁷ *Id.* at 811; see also *id.* at 813-15 (O'Connor, J., dissenting) (stating that she "would reject a rigid Eighth Amendment rule which prohibits a sentencing jury from hearing argument or considering evidence concerning the personal characteristics of the victim. [She] would thus reverse the judgment of the South Carolina Supreme Court in this case.").

²⁸ *Gathers*, 490 U.S. at 811.

²⁹ See *State v. Huertas*, 553 N.E.2d 1058 (Ohio 1990), *cert. granted*, 498 U.S. 807 (1991).

³⁰ See *id.* at 1062.

³¹ See *id.*

³² See Joint Appendix at 145, *Ohio v. Huertas*, 498 U.S. 396 (1991) (No. 89-1944).

tenced to death.³³ The Ohio jury complied with the father's wish and sentenced Huertas to death.³⁴

On appeal, the Ohio Supreme Court held in 1990 that *Booth* and *Gathers* retroactively controlled, requiring reversal of the death sentence. The court, however, based its reversal solely on the ground that sentence opinion testimony was put before the jury, yet did so in a curious fashion.³⁵ According to the court:

*The type of evidence given by the victim's family in this case goes beyond that considered in Booth and Gathers. Here, a family member offered his opinion on what the appropriate sentence would be for the defendant. A distinction should be drawn, in considering victim impact evidence, between (1) evidence relating to the victim's character, (2) evidence relating to the circumstances of the crime, and (3) evidence consisting of the opinions of the victim's family as to an appropriate punishment for the defendant.*³⁶

The *Huertas* majority thus appeared to infer that sentence opinion testimony was not addressed by *Booth*, a view underscored by its ensuing discussion of the focus in the *Gathers* and *Booth* dissents on evidence relating to the "suffering caused by a particular crime."³⁷ Writing on what it implied was a clean constitutional slate, the Ohio court concluded that the sentence opinion testimony warranted reversal. According to the court, "[e]xpressions of opinion by a witness as to the appropriateness of a particular sentence in a capital case violate the defendant's constitutional right to have the sentencing decision made by the jury and judge."³⁸

On appeal before the U.S. Supreme Court, the State of Ohio framed the issue largely as whether the Ohio Supreme Court "misinterpreted" *Booth* and *Gathers*, insofar as neither precluded victim impact evidence when the assailant knew the victim and his family, a circumstance arguably making the impact more foreseeable and

³³ See *Huertas*, 553 N.E.2d at 1062.

³⁴ See *id.* at 1060.

³⁵ See *id.* at 1065.

³⁶ *Id.* at 1064 (emphasis added).

³⁷ *Id.* at 1064, 1070 (Moyer, C.J., concurring) (observing "the fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area").

³⁸ *Huertas*, 553 N.E.2d at 1060.

defendant's personal culpability that much greater.³⁹ Huertas, on the other hand, framed the issue as whether the father's sentence opinion testimony was proper, a question answered in the negative by the Ohio Supreme Court. Moreover, in what turned out to be an extremely shrewd tactical move, Huertas argued that the sentence opinion testimony did not pose a constitutional problem; rather, the testimony warranted preclusion on the basis of Ohio evidentiary law, which bars lay witness "opinion testimony" on "ultimate issues."⁴⁰ Accordingly, Huertas urged that the writ for certiorari be dismissed as improvidently granted for want of federal question jurisdiction, thereby avoiding an otherwise "purely advisory opinion."⁴¹

The *Huertas* oral argument was marked by similar uncertainty. The justices hammered away at the position adopted by the State of Ohio, repeatedly noting that the syllabus of the Ohio Supreme Court's opinion, which under State law encapsulates the actual holding,⁴² addressed only the impropriety of the sentence opinion testimony and not the other types of victim impact evidence also admitted at trial.⁴³ In the end, the justices appeared to agree with Huertas that the case posed a mere evidentiary issue based on independent and adequate state law grounds,⁴⁴ as they dismissed the grant of *certiorari* as improvidently granted less than one week after oral arguments.⁴⁵ So, for reasons that ultimately remain unknown,⁴⁶ the Court elected to avoid directly addressing the Ohio Supreme Court's pregnant statement that the sentence opinion testimony in *Huertas* went "beyond that considered in *Booth* and *Gathers*."⁴⁷

³⁹ See Petitioner's Brief, *Ohio v. Huertas*, 498 U.S. 396 (1991), available at 1990 WL 505758.

⁴⁰ See Respondent's Brief, *Ohio v. Huertas*, 498 U.S. 386 (1991), available at 1990 WL 505759, at *12-16.

⁴¹ *Id.*

⁴² See *Ohio v. Gallagher*, 425 U.S. 257, 259 (1976) (acknowledging same).

⁴³ See Oral Argument Transcript, *Ohio v. Huertas*, 498 U.S. 386, available at 1991 WL 636295 [hereinafter "Transcript"].

⁴⁴ See, e.g., *id.* at *13 (one unidentified justice stating "[w]ell, I don't see why [reversal] wouldn't have occurred if *Booth* and *Gathers* were somehow off the books.").

⁴⁵ See *Ohio v. Huertas*, 498 U.S. 336 (Jan. 22, 1991).

⁴⁶ If the Court dismissed the case for lack of federal jurisdiction, this rationale is undercut by the reality that the Ohio Supreme Court failed to cite a single Ohio precedent in support of any purported independent and adequate state ground. See *Huertas*, 553 N.E.2d at 1065. Indeed, counsel for Huertas herself was obliged to characterize the omission of controlling Ohio precedent as "very strange" and "unique." See Transcript, *supra* note 43, at *36. Moreover, the law of the case as reflected in the syllabus refers to the violation of a "constitutional right"—not a mere evidentiary rule. *Huertas*, 553 N.E.2d at 1060.

⁴⁷ See *Huertas*, 553 N.E.2d at 1064.

Finally, almost one month after the Court's dismissal of *Huertas* came promise of a definitive answer on the permissibility of sentence opinion testimony. With a newly constituted and clear conservative majority, the Court agreed to hear *Payne v. Tennessee*, a capital case involving acknowledged victim impact evidence, tried in the wake of *Booth*.⁴⁸ Payne was convicted of the brutal stabbing deaths of Charisse Christopher and her two-year-old daughter, as well as the near-fatal stabbing of her three-year-old son Nicholas. During the sentencing phase, the State presented the testimony of Ms. Christopher's mother, who testified how her grandson Nicholas had been affected by the murders of his mother and sister:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.⁴⁹

Further, during closing argument the prosecutor argued to the jury as follows:

There is nothing you can do to ease the pain of any of the families involved in this case. . . . But there is something you can do for Nicholas. Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what kind of justice was done. He is going to want to know what happened. With your verdict you will provide the answer.⁵⁰

The jury sentenced Payne to death on both murder counts and the Supreme Court of Tennessee affirmed, deeming the admission of the victim impact evidence harmless error.⁵¹ On appeal to the Supreme Court, a new six-member majority engineered a dramatic about-face.⁵² Writing for the Court, Chief Justice Rehnquist first dis-

⁴⁸ See *Payne v. Tennessee*, 501 U.S. 808 (1991).

⁴⁹ *Id.* at 814-15.

⁵⁰ *Id.* at 815.

⁵¹ See *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990).

⁵² See *Payne v. Tennessee*, 501 U.S. 808 (1991). The Court's determination to rethink *Booth* and *Gathers* was evident at the outset when, in its grant of certiorari, the Court requested expedited consideration of the appeal, and, even more significantly, expressly

puted the premise of *Booth* and *Gathers* that "evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family" is immaterial to capital decision making.⁵³ Rather, the Chief Justice reasoned, harm traditionally has served as a factor in assessing blameworthiness in punishment decisions; although "this particular evidence—designed to portray for the sentencing authority the actual harm caused by a particular crime—is of recent origin, this hardly renders it unconstitutional."⁵⁴ The second, more practical reason for admitting victim impact evidence was to "keep the balance true" in capital trials.⁵⁵ Because *Lockett v. Ohio*⁵⁶ and *Woodson v. North Carolina*⁵⁷ mandate unfettered consideration of relevant mitigating evidence, proffered in the name of showing the "uniqueness" and personal culpability of the defendant, fairness required that evidence relating to the "uniqueness" of the life taken by the defendant also be considered by the sentencing authority.⁵⁸

In abandoning its per se Eighth Amendment prohibition of impact evidence, the *Payne* majority related in a footnote that it was only reversing the holdings in *Booth* and *Gathers* "relating to the victim and the impact of the victim's death on the victim's family."⁵⁹ The majority added that it did not feel constrained to reexamine *Booth's* prohibition of sentence opinion (and characterization) testimony, because "[n]o evidence" of this sort was presented in *Payne's* trial.⁶⁰

directed the parties to address whether *Booth* and *Gathers* should be reversed, a question not embodied in the certiorari petition. See *Payne v. Tennessee*, 498 U.S. 1080 (Feb. 19, 1991) (order granting certiorari). Surely sensing the ultimate jurisprudential outcome, Justice Stevens dissented (along with Justices Marshall and Blackmun), calling the grant of certiorari on these terms "unwise and unnecessary." See *id.* (Stevens, J., dissenting). Justice Stevens added: "[T]he Court's decision to review the alleged *Booth* error in this case would be inappropriate in any event because the decision below rested alternatively on the ground that any *Booth* violation that might have occurred was harmless beyond a reasonable doubt." *Id.*

⁵³ *Payne*, 501 U.S. at 819.

⁵⁴ *Id.*

⁵⁵ See *id.* at 827 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

⁵⁶ 438 U.S. 586 (1978).

⁵⁷ 428 U.S. 280 (1976).

⁵⁸ *Payne*, 501 U.S. at 826 ("There is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant.").

⁵⁹ *Id.* at 830 n.2.

⁶⁰ See *id.* at 830 (O'Connor, J., concurring) (stating the Court's holding did not reach *Booth's* purported limit on sentence opinion testimony); see also *id.* at 835 n.1 (Souter, J., concurring) (stating the same).

The majority's view that "no evidence" was put before the *Payne* sentencing jury, however, was plainly belied by the record. As excerpted above, the Tennessee prosecutor importuned the jury that "[Nicholas] is . . . going to want to know what type of justice was done. . . . With your verdict, you will provide the answer."⁶¹ Coming in the wake of extensive and highly emotional impact evidence of the gruesome double-murder and its profound toll on Nicholas and his family, this plea was obviously intended to induce the jury to fulfill the anticipated wishes of three-year-old Nicholas. Even more important, the prosecutor suggested that Nicholas would be disappointed if the jury concluded otherwise, yet that there was "something" the jury could "do for Nicholas."⁶²

Viewed objectively, the prosecutor's surrogate request for Nicholas was at least as conspicuous as the sentencing request made by the survivors in *Booth*. In *Booth*, a majority of the Court condemned the mere pessimistic surmise by the Bronsteins' daughter that she did not "feel that the people who [committed the murders] could ever be rehabilitated and [that] she doesn't want them to be able to do this again or put another family through this."⁶³ Similarly objectionable was the restrained statement by the Bronsteins' son that he "doesn't think anyone should be able to do something like [the murders] and get away with it."⁶⁴ The *Payne* majority's conclusion that opinion testimony was absent was made all the more inexplicable in light of the appellate record. Counsel for Payne extensively briefed the issue of sentence opinion testimony adduced below.⁶⁵ Even more remarkably, a large part of the oral argument was dedicated to a debate over the propriety of allowing witnesses—both for the State and the defense—to opine on the sentencing question.⁶⁶

⁶¹ *Payne*, 501 U.S. at 815.

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See, e.g., Brief of Petitioner, at 29, in LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1990 TERM SUPPLEMENT 578 (Phillip B. Kurland & Gerhard Casper eds., 1992) [hereinafter LANDMARK BRIEFS AND ARGUMENTS] (arguing "Payne's sentence must be set aside even if the Court leaves intact only that part of *Booth* that condemns the use of opinions and characterizations.").

⁶⁶ See Oral Argument, in LANDMARK BRIEFS AND ARGUMENTS, *supra* note 65, at 807–37. Still more curious was the failure of the otherwise comprehensive, and highly critical, dissents by Justices Stevens and Marshall to seize upon the presence of sentence opinion testimony, the admission of which would have warranted reversal or at least harmless error analysis pursuant to *Booth*. See *Payne*, 501 U.S. at 844–56 (Marshall, J., dissenting) (omitting

In the end, the *Payne* majority's conclusory statement that the record contained "no evidence" of opinion testimony is regrettable for at least two reasons.⁶⁷ First, the Court missed an opportunity to clarify its position on sentence opinion testimony, an obvious need in the wake of the cryptic result in *Huertas*. Second, even presuming the continued existence of the prohibition, the Court failed to elucidate the parameters of "opinion." As discussed next, the Court's omission has not been without consequence.

B. *The Consequences of Uncertainty*

Whatever explains the failure of the *Payne* Court to acknowledge and squarely address the issue of sentence opinion testimony, it is readily apparent that marked uncertainty now persists over the extent, and indeed the continued existence, of the prohibition ostensibly established in *Booth*.⁶⁸ This situation is most pronounced in Oklahoma,

any discussion of admitted opinion testimony); see also *id.* at 856-67 (Stevens, J., dissenting) (same).

⁶⁷ That the sentence opinion in *Payne* was admitted on the basis of the prosecutor's closing statement, and thus as a technical matter did not emanate from witnesses as in *Booth*, should have been of no moment. As Professor Vivian Berger noted in the immediate wake of *Payne*, *Gathers* "made such a distinction irrelevant." Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 42 n.109 (1992).

Empirical work, although scant, confirms the suspected prejudicial influence of improper prosecutorial argument. One recent study, for instance, found on the basis of controlled mock capital trials that "[p]articipant-jurors who were exposed to improper statements made by the prosecution were significantly more likely to recommend the death penalty than jurors not exposed." See Judy Platania & Gary Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Arguments in Capital Trials*, 23 LAW & HUM. BEHAV. 471, 483 (1999).

⁶⁸ See, e.g., *People v. Sanders*, 905 P.2d 420, 459 (Cal. 1995) (stating *Payne* "did not address the admissibility" of sentence opinion testimony); *State v. Card*, 825 P.2d 1081, 1088 (Idaho 1991) (stating "[l]eft unresolved by *Payne* . . . is the issue of the family's feelings and comments concerning the sentence to be imposed"); *State v. Goodwin*, 703 N.E.2d 1251, 1262 (Ohio 1999) (stating "*Payne* reserved judgment about opinions from the victim's family as to the sentence a capital defendant should receive"). Commentators over the past several years have expressed similar uncertainty. See Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 253 n.122 (1991) (asserting "neither *Booth* nor *Gathers* specifically addressed a situation in which the victim (or the victim's survivors) articulated a sentence recommendation"); Stephen P. Garvey, "As the Gentle Rain From Heaven": Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 1018 n.109 (1996) (stating sentence opinion testimony "is probably inadmissible" in the wake of *Payne*); Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443, 469 (stating *Payne* "did not resolve whether a victim's family members could express their opinion regarding the proper punishment"); Kathryn E. Bartolo, Comment, *The Future Role of Victim Statements of Opinion in Capital Sentencing Proceedings*, 77 IOWA L. REV. 1217, 1239 (1992) (arguing *Payne* "sent an ambiguous message that a victim statement of

where the judiciary has concluded that *Payne* "implicitly" overruled *Booth* altogether,⁶⁹ and statutory law expressly permits sentence opinion testimony in capital trials.⁷⁰ Accordingly, in Oklahoma, opinion testimony is allowed as long as the opinion is "given as a straightforward, concise response to a question asking what the recommendation is; or a short statement of recommendation in a written statement, without amplification."⁷¹

Sentence opinion testimony is also very often allowed on the basis of harmless error review, which itself fuels further prosecutorial use of the testimony.⁷² The case law contains numerous instances of blithe appellate approval of explicit sentence opinions that make the muted opinions condemned in *Booth* pale in comparison.⁷³ This is es-

opinion introduced by a prosecutor may be admissible"); Michael I. Oberlander, Comment, *The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621, 1656-57 (1992) (stating "the *Payne* Court provided state courts with the opportunity to allow the introduction into evidence of the victim's family members' opinions of the sentence that the sentencing agent should impose").

⁶⁹ See *Conover v. State*, 933 P.2d 904, 920 (Okla. Crim. App. 1997); see also *Ledbetter v. State*, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997).

⁷⁰ See OKLA. STAT. ANN. tit. 22, § 984(1) (West 2000) (permitting victim impact statement to contain, *inter alia*, "the victim's [or survivor's] opinion of a recommended sentence.").

⁷¹ See *Ledbetter*, 933 P.2d at 891.

⁷² See ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 23 (1970) ("In the long run there would be a closer guard against error at the trial, if appellate courts were alert to reverse, in case of doubt, for error that could have contaminated the judgment."); Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error be Tolerated*, 70 N.Y.U. L. REV. 1167, 1194 (1996) ("[W]e can hardly expect prosecutors to respect the rights of criminal defendants . . . when we as judges are unwilling to do so.").

⁷³ See, e.g., *State v. Paz*, 798 P.2d 1, 14-15 (Idaho 1990) (finding harmless error when father of victim "recommends that the court give the death penalty" to defendant); *Smith v. State*, 686 N.E.2d 1264, 1277 (Ind. 1997) (finding harmless error when victim's sister requested that defendant get "what he deserves" and thereby prevent "others from undergoing anguish"); *State v. Scales*, 655 So. 2d 1326, 1336 (La. 1995) (finding harmless error when prosecutor related that victim's family "requests" death penalty); *Smith v. State*, 932 P.2d 521, 537 n.13 (Okla. 1996) (finding harmless error when decedent's father beseeched jury "What it [sic] going to take? More people got to be victims of these crimes that are being committed?"); *State v. Middlebrooks*, 995 S.W.2d 550, 558 (Tenn. 1999) (finding harmless error when prosecutor importuned jury that the victim's "family asks that you impose the death penalty. The State asks you to impose the death penalty Justice demands it on the facts and the law.").

The Oklahoma Court of Criminal Appeals has characterized the following statement from the mother of a 9-year-old victim as "over amplified," but harmless:

I don't feel any remorse towards the defendant. I feel we should carry on with the death sentence. The death sentence without benefit of the judge and jury was what he gave freely to my child. I do not see that he can take from her and be entitled to keep his own.

pecially so when sentencing is carried out by the trial judge,⁷⁴ despite the widespread recognition that, like jurors, judges can succumb to the pathos and undue prejudice bred by inflammatory testimony.⁷⁵ As one Arizona appellate judge stated in response to his colleagues' confident rejection of a challenge based on sentence opinion testimony:

We have presumed that trial judges will ignore such testimony, but one must wonder how accurate such an assumption may be. The sentencing decision in capital cases is difficult enough without subjecting the trial judge to the emotional pressure of listening to the victims' understandable but legally inadmissible recommendations, often motivated by the need for catharsis and sometimes by the desire for revenge.⁷⁶

Despite this reality, appellate courts now often resort to a highly suspect form of heuristic analysis, rejecting claims of prejudice merely

State v. Salazar, 973 P.2d 315, 325 (Okla. Crim. App. 1998), *cert denied*, 120 S.Ct. 226 (1999).

⁷⁴ See, e.g., State v. Mann, 934 P.2d 784, 792 (Ariz. 1997); Davis v. State, 586 So. 2d 1038, 1041 (Fla. 1991); State v. Card, 825 P.2d 1081, 1089 (Idaho 1991); People v. Harris, 695 N.E.2d 447, 467 (Ill. 1998); State v. Hough, 690 N.E.2d 267, 271 (Ind. 1997); State v. Gideon, 894 P.2d 850, 864 (Kan. 1995); Johnson v. State, 703 A.2d 1267, 1277 (Md. 1998); State v. Taylor, 944 S.W.2d 925, 938 (Mo. 1997) (en banc); State v. Bjorklund, 604 N.W.2d 169, 214-15 (Neb. 2000); State v. Fautenberry, 650 N.E.2d 878, 882 (Ohio 1995); Beck v. Commonwealth, 484 S.E.2d 898, 906 (Va. 1997).

⁷⁵ Indeed, even putting aside the obvious empathic pull of such testimony, concern should exist over the fact that it is provided in the politically charged context of the death penalty. See Harris v. Alabama, 513 U.S. 504, 523 (1995) (Stevens, J., dissenting) ("Not surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty."); Haney v. State, 603 So. 2d 368, 383 (Ala. Crim. App. 1991) ("While we might be inclined to rely on the presumption that a trial court is presumed to have disregarded improper factors in sentencing in non-capital cases, we are reluctant to do so in capital cases."); People v. Vecchio, 819 P.2d 533, 535 (Colo. Ct. App. 1991) (noting that "retribution at the polls is a risk undertaken by every judicial candidate upon acceptance in a judicial position"); State v. Charboneau, 774 P.2d 299, 320 (Idaho 1989) ("The risk of arbitrary and capricious decisions exists whether the sentence is determined by a judge or a jury.").

For examples of the extensive scholarship on the effects of such politicization see, for example, RICHARD C. DIETER, *KILLING FOR VOTES: THE DANGERS OF POLITICIZING THE DEATH PENALTY PROCESS* (1996); John Bhune & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 CAL. L. REV. 465 (1999); Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

⁷⁶ State v. Williams, 904 P.2d 437, 455 (Ariz. 1995) (Feldman, C.J., concurring).

because the lower court omits any express reliance on the opinion testimony in its sentencing order. In *People v. Brown*,⁷⁷ for instance, the court heard the following opinion testimony (from three different survivors, including two statements read by the prosecutor):

People like [the defendant]. . . don't deserve to live another day because they simply don't appreciate life and how precious it is. There seems to be a large injustice that has occurred and something needs to be done about it.

* * *

It's our prayer that justice prevails and for the defendant, justice would be that this person who planned and maliciously traumatized and killed our loved ones. . . be put to death. . . . Our family's plea is that you, as judge, give this defendant his just due of death. . . .

* * *

Judge Gaughan, I am begging you to no longer waste our tax dollars on a person with no respect for the law or life. I am begging you to impose the stiffest penalty you can by law on Anthony Brown. . . . Society, and especially myself, do not want people like Brown on this earth. So, please, please, please give Anthony Brown what he deserves, the death penalty.⁷⁸

On appeal, the Illinois Supreme Court upheld the death sentence ultimately imposed because "[n]otably, the trial judge did not refer to the [opinion testimony] when he announced his decision to impose the death penalty."⁷⁹ Evincing similar faith in the inviolability of its lower courts, the Supreme Court of Ohio rejected a challenge based on acknowledged sentence opinion testimony, inferring that "the trial judge remained uninfluenced, since his sentencing decision never referred to the [witness's] opinion."⁸⁰

Numerous other decisions highlight the vague definitional parameters of "opinion," with courts adopting decidedly broad under-

⁷⁷ 705 N.E.2d 809 (Ill. 1998).

⁷⁸ *Id.* at 822.

⁷⁹ *Id.* at 823.

⁸⁰ See *Goodwin*, 703 N.E.2d at 1262-63; see also, e.g., *Hyde v. State*, 1998 WL 32605 *7 (Ala. Crim. App. 1998) (rejecting appeal because lower court omitted express reliance on opinion testimony). But see *Ex parte McWilliams*, 640 So. 2d 1015, 1017 (Ala. 1993) (reversing and remanding so that trial judge could make express written finding stating whether opinion testimony was relied upon).

standings of the term, and erring on the side of permitting testimony. In *Witter v. State*,⁸¹ for instance, the wife of the decedent read a statement in which she asked the jury to "show no mercy." The Supreme Court of Nevada unanimously concluded that the witness's comment did not amount to an "opinion" but rather constituted a request that the jury return the most severe sentence it felt appropriate.⁸² Similarly, the Illinois Supreme Court recently upheld the admissibility of the following sentiment voiced by the wife of a murdered police officer:

My family and I are very confident that all of you will return a quick verdict which will send a message to my children, society, and the law enforcement community that we simply will not tolerate or accept our last means of protection being annihilated on our streets. Renew our faith in the criminal justice system and bring a phase of closure to this ongoing nightmare that fills our lives.⁸³

According to the court, the testimony was permissible because the requests for "closure" and a "quick verdict" did not relate to the death penalty, ultimately imposed by the jury, but rather to the witness's "desire that the jury deliberate in an expedient manner so that she and her family could move on with their lives."⁸⁴ The Supreme Court of Missouri displayed only slightly less indulgence when it recently concluded that the following "does not recommend a sentence": "I believe this man has caused enough chaos and I ask he be fairly punished for what he has done."⁸⁵

⁸¹ 921 P.2d 886 (Nev. 1996).

⁸² See *id.* at 896.

⁸³ See *People v. Williams*, 692 N.E.2d 1109, 1124 (Ill. 1998).

⁸⁴ *Id.*; see also *People v. Shaw*, 713 N.E.2d 1161, 1187-88 (Ill. 1999) (affirming virtually identical statement of same witness in trial of co-defendant).

⁸⁵ See *State v. Worthington*, 8 S.W.3d 83, 89 n.2 (Mo. 1999) (en banc). The Eighth Circuit, addressing a federal habeas claim by another Missouri death row inmate, very recently considered the permissibility of a survivor's statement that his family "was very concerned" about what would "happen[]" at sentencing. See *Parker v. Bowersox*, 188 F.3d 923, 931 (8th Cir. 1999). The court dismissed the statement as "not so outcome specific as the statements in *Booth*," and offered the following strained analysis:

The statement could be interpreted to mean that the family wanted the jury to impose the death sentence, that it did not want the jury to impose the death sentence, or simply that, no matter what the outcome, the trial was a very important event for the family.

See *id.* at 932. Because it granted habeas relief on another basis, however, the court ultimately reserved final judgement on the survivor's statement, adding that "[w]hether pru-

Finally, the consequences of uncertainty, and the continued weakening of *Booth*, can be observed in what appears as a highly reductionistic, a priori method of judicial gatekeeping. The Alabama Court of Criminal Appeals very recently reflected this approach, rejecting a claim when the father and brother of the victim (a police officer) "begged" the jury to impose death in the name of the victim's family and "every police officer."⁸⁶ According to the Alabama court: "The jury surely recognized the testimony of the victim impact witnesses as a normal, human reaction to the death of a loved one. That these witnesses wanted [defendant] to receive the death penalty would come as no surprise to members of the jury."⁸⁷ Similarly, in Oklahoma sentence opinion testimony is permitted because "a jury expects such a statement from the victim's family."⁸⁸

C. What the Future Likely Holds

Although still frequently acknowledged by the courts,⁸⁹ there is increasing evidence that the putative bar on sentence opinion testimony is weakening, a process that will likely continue in the years to come. Several reasons account for this. First, the *Booth* limit on opinion testimony rests on shaky jurisprudential foundations,⁹⁰ an instability that should not provide much confidence given the Rehnquist Court's penchant for reversing or severely limiting what are seen as liberal criminal justice-related precedents.⁹¹ Indeed, *Payne* itself represents a compelling example of this predilection, with the six-member conservative majority led by the Chief Justice showing no compunction whatsoever in reexamining *Booth* and *Gathers*.⁹² Moreover, the Court's self-conscious deference to state legislative enactments in the area of sentencing criteria,⁹³ and bias in favor of increasing the

dential considerations would counsel against introducing so ambiguous a statement upon retrial is of course a matter for the State to consider." See *id.*

⁸⁶ See *State v. Whitebread*, 1999 WL 669323 *61, *65 (Ala. Crim. App. 1999).

⁸⁷ *Id.* at *65.

⁸⁸ *Wood v. State*, 959 P.2d 1, 12 (Okla. Crim. App. 1998).

⁸⁹ See, e.g., *State v. Stenson*, 940 P.2d 1239, 1279 n.19 (Wash. 1997) (stating "[i]t is clear neither the defendant's family nor the victim's family may tell the jury what sentence should be imposed").

⁹⁰ See *supra* notes 52-59 and accompanying text.

⁹¹ See generally CHRISTOPHER E. SMITH, *THE REHNQUIST COURT AND CRIMINAL PUNISHMENT* (1997); THOMAS R. LEE, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999).

⁹² See *supra* note 52 and accompanying text.

⁹³ See, e.g., *Payne*, 501 U.S. at 824-25 (asserting "[t]he States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs");

amount of information put before capital juries,⁹⁴ as evidenced by *Payne*,⁹⁵ make the continued viability of the remnants of *Booth* all the more uncertain. Indeed, in the *Payne* oral argument, both then-U.S. Attorney General Richard Thornburgh (making an unusual personal appearance) and counsel for the State of Tennessee argued that sentence opinion testimony should be permitted for the prosecution and defense alike in capital proceedings.⁹⁶

Second, attention doubtless will increasingly be drawn to the current jurisprudential asymmetry, which allows sentence opinion testi-

id. at 824 (stating that "[u]nder our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States"); *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990) (asserting "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished"); *Booth*, 482 U.S. at 515 (White, J., dissenting) (citation omitted) (arguing "determinations of appropriate sentencing considerations are 'peculiarly questions of legislative policy'"); see also *Skipper v. South Carolina*, 476 U.S. 1, 15 (1986) (Powell, J., concurring) (stating because the "Court has no special expertise in deciding" sentencing criteria, "[i]t makes little sense . . . to substitute our judgment of relevance for that of state courts and legislatures"); *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (stating the Court will "presume [the] validity" of a criminal enactment and that "a heavy burden rests on those who would attack the judgment of the representatives of the people").

⁹⁴ See *Gregg*, 428 U.S. at 204 (stating "[w]e think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision").

⁹⁵ As Chief Justice Rehnquist stated for the Court:

We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

Payne, 501 U.S. at 825 (quoting *Booth*, 482 U.S. at 517 (White, J., dissenting)). But see *id.* at 859 (Stevens, J., dissenting) (referring to majority's approval of victim impact evidence as a "classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance.").

To a significant extent, this inclusiveness stems from the Court's apparent frustration over trying to reconcile the competing demands of accuracy and uniformity in capital procedures. As Professor Markus Dubber has stated, "[t]he current disarray in capital jurisprudence accurately reflects the uneasy compromise that must plague any system designed to accommodate our compassion for the victims of capital crimes while preserving the dignity of those whose lives it puts at stake." Dubber, *supra* note 3, at 155. According to Dubber, "[c]apital sentencing law is in a state of acute system overload. . . symboliz[ing] a system that has thrown its hands up in frustration with its inability to accommodate all relevant interests within a framework of meaningful rules." *Id.*

⁹⁶ See LANDMARK BRIEFS AND ARGUMENTS, *supra* note 65, at 822-23 (counsel for State of Tennessee); see also *id.* at 833 (Attorney General Thornburgh).

mony to be considered in non-capital, yet not in capital, trials.⁹⁷ With the Supreme Court in the lead, the "death is different" rationale—invoked by the *Booth* majority to bar victim impact evidence in capital trials alone—is showing obvious signs of wear.⁹⁸ For evidence of the allure of such emerging symmetry one need only look once again to *Payne*, which unequivocally renounced *Booth's* asymmetric, per se prohibition of victim impact evidence solely in capital trials. As Justice White noted in his *Booth* dissent, a rationale ultimately triumphant in the *Payne* majority opinion:

If punishment can be enhanced in noncapital cases on the basis of the harm caused, irrespective of the offender's specific intention to cause such harm, I fail to see why the same approach is unconstitutional in death cases. If anything I would think that victim impact statements are particularly appropriate in capital sentencing hearings: the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in⁹⁹

Third, and perhaps most important, the admission of sentence opinion testimony lies with the grain of larger systemic changes now occurring nationwide as a result of the powerful victims' rights movement.¹⁰⁰ Today, the constitutions of at least thirty-one states con-

⁹⁷ See *supra* notes 5–6 and accompanying text (discussing widespread availability of victims' right to opine on sentences); see also Tobolowsky, *supra* note 6, at 69 (stating "a victim's right to be heard at sentencing has been one of the most widely adopted victim rights in the last fifteen years. The federal system and every state provide eligible victims an opportunity to offer input to the court regarding sentencing either in writing, orally or both.").

⁹⁸ See, e.g., Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 323 (1997) (noting "[m]ore recently, the Court has twisted the purpose of death is different to such an extent that the doctrine now represents the ultimate irony. Death often triggers fewer safeguards in certain circumstances than lesser forms of punishment."); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 397 (1995) (stating "close examination of the Court's decisions over the past twenty years reveals that the procedural safeguards in death cases are not as different as one might expect. Although the Court has carved out a series of protections applicable only to capital trials, it has done so in an entirely ad hoc fashion and . . . relegate[d] capital defendants to the same level of protection as non-capital defendants.").

⁹⁹ See *Booth*, 482 U.S. at 516–17 (White, J., dissenting).

¹⁰⁰ The opinions of several members of the Court in *Payne* highlight the inescapable influence of the movement. See, e.g., *Payne*, 501 U.S. at 834 (Scalia, J., concurring) (asserting that *Booth* "conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."); *id.* at 859 (Stevens, J., dissenting) (stating that the majority "obviously has been moved by an argument that has strong political ap-

tain victims' rights provisions,¹⁰¹ and efforts have been made in the last several sessions of Congress to adopt a Victims' Rights Amendment to the U.S. Constitution.¹⁰² Among the many rights sought to be

peal but no proper place in a reasoned judicial opinion"); *id.* at 867 (acknowledging "the political strength of the 'victims' rights' movement" and "recogniz[ing] that today's decision will be greeted with enthusiasm by a large number of concerned and thoughtful citizens").

Among the many telling indicia of this pervasive influence is the result reached in *People v. Robinson*, 699 N.E.2d 1086 (Ill. Ct. App. 1998), *vacated*, 719 N.E.2d 662 (Ill. 1999). *Robinson* involved the joint appeal of five defendants, each of whom died during the pendency of their appeals, and raised the question of whether the defendants' intervening deaths served to abate their convictions *ab initio*. *Id.* at 1089. The court stressed that although historically criminal prosecutions were designed to "punish the guilty and protect society from any future criminal misdeeds of the defendant," the rights of "crime victims and witnesses" today also "have important, personal interests at stake in criminal prosecutions." *Id.* The latter possess "legally recognized rights in criminal proceedings which are distinct from the interests of either the defendant or the State." *Id.* Taking into account the gripping victim impact testimony adduced in the voluntary manslaughter trial of one appellant, which included a survivor's request that the court impose a sentence so as to "[h]elp renew our faith in the judicial system and help us to cope with our loss," the court rejected the claim of each appellant convicted of a "violent crime." *Id.* at 1090.

In these cases, individual victims suffered horrible physical and psychological injury, and their families endured almost unspeakable emotional anguish. Both the [Victim-Witness Rights] Act and our constitution now recognize that the families of these victims . . . continue to suffer, long after the horror of the criminal attack . . .

Clearly, a judicial order vacating the conviction of . . . a defendant who is no longer able to appreciate the benefits of such a ruling, would have a senselessly harsh impact upon the psychological well being of [survivors]. It would further have the effect of eroding confidence in the criminal justice system among those victims and witnesses who participated in the trial by subjecting the trial result . . . to the arbitrary timing [of defendant's death].

Id. at 1089. *But see id.* at 1093 (Greiman, J., dissenting) (stating "[g]enerally, courts have taken the position that the aim of the criminal justice system is the protection of the public and the punishment of the guilty. Upon the death of a defendant, these goals are unnecessary on the one hand and impossible on the other.").

¹⁰¹ See Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 289 (1999). An example of such a provision is found in the Missouri Constitution, which ensures crime victims the right to be "heard at guilty pleas, bail hearings, sentencings . . . unless in the determination of the court the interests of justice require otherwise." See MO. CONST. art. I, § 32.1(2). Interpreting this provision, the Supreme Court of Missouri recently addressed whether a lower court acted unreasonably when it rejected a request from the victim's survivors that life be imposed on the defendant. See *State v. Barnett*, 980 S.W.2d 297 (Mo. 1998) (en banc). The *Barnett* court affirmed, concluding that "the requirements of this provision are fully satisfied by affording victims the opportunity for input at sentencing, and in this case, that opportunity was provided." *Id.* at 308; see also *State v. Jones*, 979 S.W.2d 171, 179 (Mo. 1998) (holding same on virtually identical facts).

¹⁰² See generally Paul G. Cassell, *Barbarians at the Gate? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 (1999); Lynne Henderson, *Co-opting Compassion:*

enshrined in the proposed federal amendment is a right provided to the victim or the "victim's lawful representative"¹⁰³ to "be heard and/or submit a statement regarding sentencing."¹⁰⁴ Needless to say, the prospect of affording the survivors of murder victims a constitutional right to express their views on the appropriate sentence to be imposed on the killers of their loved ones would doubtless have substantial appeal to victims' advocates¹⁰⁵ and politicians alike.¹⁰⁶ Proponents would also likely assert that such direct involvement in sentencing would have the salutary effect of promoting citizen reliance on, and belief in, the justice system, an interest repeatedly identified by the Supreme Court in its capital decisions.¹⁰⁷

The Federal Victim's Rights Amendment, 10 ST. THOMAS L. REV. 579 (1998) [hereinafter *Co-opting Compassion*]; Robert P. Mosteller & H. Jefferson Powell, Essay, *With Disdain for the Constitutional Craft: The Proposed Victim's Rights Amendment*, 78 N.C. L. REV. 371 (2000).

¹⁰³ See S.J. Res. 44, 105th Cong., § 1 (1998).

¹⁰⁴ *Id.* § 2.

¹⁰⁵ As noted by one commentator over ten years ago: "Victim opinion is probably the type of victim information that proponents of victim participation at sentencing want most to be allowed in sentencing proceedings." Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 210 (1988).

The personal benefit ultimately accruing to those providing testimony, however, is open to question. Compare Susan E. Gergan & Nicholas Rodriguez, *Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?*, 8 ST. JOHN'S J. LEGAL COMMENT. 255 (1992) (discussing "positive catharsis" among survivors of providing testimony) with Berger, *supra* note 67, at 59 (stating survivor testimony "encourages the prosecution to urge mourning family and friends to present their grief in a forum ill-suited to respond to it, yet holding out a seductive (if illusory) capacity to do so"). See generally Lynne Henderson, *Revisiting Victims' Rights*, 1999 UTAH L. REV. 383, 402-11 (1999) (surveying arguments made in support of the "therapeutic rationale").

¹⁰⁶ See, e.g., JOEL BEST, *RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS* 119-41 (1999) (describing powerful empathic appeal of "the victim industry"); Henderson, *supra* note 102, at 591 (stating that "[i]ndividual victims and victims' groups supporting punitive responses to crime have the public and legislative ear; those that do not are ignored"); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1414 (1993) (stating that "[t]he stories of victims are attractive because they arouse emotions"); Bruce Shapiro, *Victims & Vengeance: Why the Victims' Rights Amendment is a Bad Idea*, THE NATION, Feb. 10, 1997, at 11 (stating "[i]n the language of American politics today, victims of violent crime are accorded uniquely sanctified status"); Jeffery Toobin, *Victim Power: How a New Legal Movement is Shaping the Oklahoma City Bombing Trial*, THE NEW YORKER, Mar. 24, 1997, at 40 (discussing influence of victims' rights movement and its impact on new federal legislation evolving out of the Timothy McVeigh capital trial). As Professor Henderson has observed: "[a]pparently, no matter what the substance of a victim's rights proposal is, anyone who objects is considered to be 'against' victims. It is difficult to point out the harms that proposals could cause victims as well as the criminal process when one is so categorized." Henderson, *Co-opting Compassion*, *supra* note 102, at 580 n.11.

¹⁰⁷ See, e.g., Gregg, 428 U.S. at 183 (asserting death penalty is "essential in an ordered society that asks its citizens to rely on legal process rather than self-help to vindicate their wrongs"); *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (asserting

In short, there is ample reason to expect that sentence opinion testimony will continue to proliferate in capital trials,¹⁰⁸ increasing the likelihood that the Supreme Court will be obliged to re-examine the appropriateness of such testimony. With this prospect in mind, the Article next surveys the several compelling reasons why the move toward allowing sentence opinion testimony in capital trials should be vigorously resisted.

II. WHY SENTENCE OPINION TESTIMONY SHOULD BE BARRED

Because the death penalty is society's most severe punishment, capital sentencing procedures are theoretically designed to single out only the most death-worthy.¹⁰⁹ In order to facilitate this sorting, death penalty jurisdictions employ a bifurcated procedure. After first determining that a particular defendant is guilty of an enumerated capital crime, the sentencing authority (typically a jury) must decide whether death should be imposed.¹¹⁰ In so doing, a "reasoned moral response" to the crime and the defendant is reached,¹¹¹ which turns on aggravating and mitigating circumstances deemed relevant and worthy of consideration.¹¹²

Given that the sentencing phase is the denouement of a capital trial, it should come as no surprise that in many cases the friends and

that society permits individuals to channel their instinctive need to exact retribution when it makes death available as a sentencing option).

¹⁰⁸ See, e.g., *FLETCHER*, *supra* note 1, at 198 ("One of the curiosities of the American victims' rights movement is that it balks at strong measures to empower the victim at the pre-trial and trial phases and then abandons all restraint on the victim's input at the time of sentencing. If the jury finds the defendant guilty, then the victim comes into his own."); Lynne Henderson, *The Wrongs of Victims' Rights*, 37 *STAN. L. REV.* 937, 986 (1985) (noting "the most politically visible activity in the victim's rights movement focuses on the end, rather than the beginning of the criminal process").

¹⁰⁹ See *California v. Ramos*, 463 U.S. 992, 998-99 (1983) (stating "[t]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

¹¹⁰ See, e.g., *Tuilaepa v. California*, 512 U.S. 967, 971 (1994) (stating "[o]ur capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision"); *Lowenfeld v. Phelps*, 484 U.S. 231, 246 (1988) (stating similarly).

¹¹¹ See *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (O'Connor, J., concurring); see also *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985) (quoting *Zant v. Stephens*, 462 U.S. 862, 900 (1983)) (referring to decision as a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves'").

¹¹² See generally Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Schemes*, 6 *WM. & MARY BILL OF RTS. J.* 343 (1998).

loved ones of the victim and the defendant wish to have a direct say. However, precisely because the penalty phase is so critical and delicate, a time when the sentencer must make the visceral, moral choice of whether the offender deserves death,¹¹³ sentence opinion testimony should be barred.

A. *The Constitutional Irrelevance of Witness Sentence Opinion Testimony*

The first, and most fundamental, reason in support of the prohibition of sentence opinion testimony is its distinct irrelevance to capital decision making. A witness's opinion—even when the witness is a loved one of the murder victim—that a defendant deserves death in no way serves to aggravate a murder to death-worthiness. An opinion does not relate to the nature of the offense or the offender, the cornerstones of death penalty decision making.¹¹⁴ Nor, for that matter, does a witness's expressly stated opinion that a punishment less than death is warranted come within the ambit of mitigation as conceived by the United States Supreme Court in *Lockett v. Ohio*, because it does not relate to "any aspect of the defendant's character or record and any of the circumstances of the offense."¹¹⁵

As the Ohio Supreme Court stated in *State v. Huertas*, such opinions "have nothing to do with culpability or moral guilt. They are simply opinions on the appropriate sentence given by someone who, though having a great personal interest in the outcome, is not a member of the jury."¹¹⁶ Despite the fact that evidentiary rules are relaxed in the capital sentencing phase,¹¹⁷ admissibility still turns on

¹¹³ The Supreme Court has been at pains to acknowledge the uniquely burdensome task faced by capital juries:

A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called upon to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide the issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion.

Caldwell v. Mississippi, 472 U.S. 320, 333 (1985).

¹¹⁴ See *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (stating the appropriateness of a death sentence "very much depends on the degree of [defendant's] culpability").

¹¹⁵ 438 U.S. 586, 604 (1978); see also *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990) ("[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to a defendant's character or record or the circumstances of the offense.").

¹¹⁶ See 553 N.E.2d 1058, 1064 (Ohio 1990).

¹¹⁷ See *United States v. Frank*, 8 F. Supp. 2d 253, 269 (S.D.N.Y. 1998) (observing "[t]hat the federal rules of evidence are suspended during a capital sentencing hearing is particu-

"relevance," as circumscribed by the constitutional parameters of aggravation and mitigation.¹¹⁸ Opinion testimony simply strays beyond those considerations deemed necessary to reach a constitutionally valid, "reasoned moral response."¹¹⁹ Ultimately, if either death proponents or opponents were allowed to so testify, death deliberations would be reduced to a "contest of irrelevant opinions."¹²⁰

B. *The Specter of Arbitrariness*

A related but distinct reason to bar sentence opinion testimony is its arbitrary quality. Since *Furman v. Georgia*,¹²¹ the Supreme Court has guarded against the introduction of factors that might contribute to arbitrary decision making in capital cases. Ostensibly at least, the

larly appropriate given the difference of death from all other penalties"). See generally Robert A. Kelly, *Applicability of the Rules of Evidence to the Capital Sentencing Proceeding: Theoretical and Practical Support for Open Admissibility of Mitigating Information*, 60 UMKC L. REV. 411 (1992) (discussing relaxation of otherwise strict evidentiary rules in the capital penalty phase).

¹¹⁸ Moreover, even if evidentiary rules applied with full force, opinion testimony would be inadmissible. See, e.g., FED. R. EVID. 701 (permitting lay witness opinion testimony only if "rationally based on the perception of the witness . . ."). Clearly, a witness's opinion on punishment is not "rationally based," but rather constitutes a highly personal, subjective assessment.

¹¹⁹ See *supra* notes 109-16 and accompanying text.

¹²⁰ *Robison v. Maynard*, 943 F.2d 1216 (10th Cir. 1991), *aff'g* 829 F.2d 1501, 1504 (10th Cir. 1987) (affirming upon reconsideration in wake of *Payne*). With respect to victims, opinions can originate from victims themselves (on the basis of a pre-murder expression of preference) or, more commonly, their survivors. For examples of courts rejecting admission of testimony of murder victims' anti-death views at sentencing, see *Campbell v. State*, 679 So. 2d 720, 725 (Fla. 1996) (upholding preclusion of testimony that the murder victim opposed capital punishment because testimony did not constitute mitigating evidence because it related to neither the defendant nor his crime) and *State v. Barone*, 969 P.2d 1013, 1031-32 (Or. 1998) (concluding same). For examples of survivors' anti-death sentiments being rejected, see *Robison*, 943 F.2d at 1217-18 and *State v. Trostle*, 951 P.2d 869, 887 (Ariz. 1997).

In an interesting twist, a recent Arizona case involved survivors with conflicting views on the appropriateness of the death penalty for the defendant. The victim's sister submitted a statement to the sentencing court requesting life imprisonment, not death, because "she did not want defendant's family to suffer the way her family had suffered." *State v. Williams*, 904 P.2d 437, 454 (Ariz. 1995). The Arizona Supreme Court summarily deemed the request irrelevant as mitigating evidence as it did not relate to defendant's character or the circumstances of the offense. See *id.* Also in the same case, the presentence report provided to the sentencing court indicated that the victim's father and another sister wished that death be imposed. See *id.* This latter information the *Williams* court deemed irrelevant, yet harmless because there was no evidence that the judge "gave any weight to the victims' recommendations when he sentenced defendant on the capital count." *Id.* at 455.

¹²¹ 408 U.S. 238 (1972).

death decision must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."¹²²

Sentence opinion testimony is decidedly at odds with this mandate, as it enhances the risk that death will be "imposed out of whim, passion, prejudice or mistake."¹²³ As stated by the *Booth* Court, "formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."¹²⁴ Admission of "emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision making we require in capital cases."¹²⁵

Opinion testimony, in short, allows the sentencer to impose (or abstain from) death not because the evidence warrants such an outcome, but because of the unpredictable desires of witnesses.¹²⁶ In addition, relative to factual testimony otherwise put before the sentencer, the highly subjective (and typically emotional) quality of opinion testimony heightens the risk of the sentencing decision being influenced by the entirely arbitrary fortuity of the persuasiveness, attractiveness or eloquence of witnesses.¹²⁷ While of course such fortu-

¹²² *Gregg v. Georgia*, 428 U.S. 153, 189 (1976); see also *Zant*, 462 U.S. at 885 (prohibiting consideration of factors that are "constitutionally impermissible or totally irrelevant to the sentencing process"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (identifying constitutional need for "reliability in the determination that death is the appropriate punishment in a specific case").

¹²³ *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring); see also *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (citation omitted) (stating that capital procedures should seek to ensure that the "death penalty is . . . imposed on the basis of 'reason rather than caprice or emotion'").

¹²⁴ *Booth v. Maryland*, 482 U.S. 496, 508 (1987).

¹²⁵ *Id.* at 508-09.

¹²⁶ See, e.g., Victoria Harker, *Cry for Mercy; Church Aide Killers Sentenced Today*, THE ARIZ. REPUBLIC, Sept. 30, 1999, at A1 (describing conflicting desires of survivors of multiple-victim murder over whether death penalty should be imposed); Reynolds Holding, *Some Victims More Equal Than Others*, SAN FRANCISCO CHRON., Feb. 6, 2000, at 3 (describing sentencing proceeding wherein victim's mother testified of a "revelation" that her son wanted life imposed, to which the jury deferred).

¹²⁷ *Payne*, of course, is subject to a similar charge of arbitrariness, insofar as the amount and quality of impact evidence available to the State inevitably turns on the vagaries of the particular victim involved, and the eloquence and appeal of the State's witnesses willing to testify. See *Payne v. Tennessee*, 501 U.S. 808, 860-64 (1991) (Stevens, J., dissenting) (noting same). The *Payne* majority's primary rationale, however—that "impact" should weigh in the sentencer's evaluation of the "harm" caused by the murder, even if the specific loss was not contemplated by the defendant—enjoys at least some plausible merit, however attenuated. Opinion testimony, on the other hand, benefits from nothing of the sort, as it has no bearing on culpability whatsoever. But see generally Stephen J. Schulhofer, *Harm and Punishment: A Critique of the Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L.

ities are basic to the adversary system,¹²⁸ this does not justify the purposeful injection of arbitrariness on the "ultimate issue" into the delicate capital decision making process.¹²⁹ This is especially so given the increasing evidence that capital jurors commonly decide the life or death question prematurely during the guilt phase,¹³⁰ and that jurors are otherwise emotionally and logically predisposed to accord significant weight to the punitive views of survivors, in particular.¹³¹

REV. 1497 (1974) (arguing that overemphasis on resulting harm disserves other important goals and concerns of criminal law).

¹²⁸ Justice White's dissent in *Booth* downplayed this concern:

The Court's reliance on the alleged arbitrariness that can result from the differing ability of victims' families to articulate their sense of loss is a makeweight consideration: No two prosecutors have exactly the same ability to communicate to the jury; no two witnesses have exactly the same ability to communicate the facts; but there is no requirement in capital cases that the evidence and argument be reduced to the lowest common denominator.

Booth, 482 U.S. at 517-18 (White, J., dissenting). A substantial body of empirical work on the influence of witness traits on juror deliberations, however, undercuts this judicial insouciance. See, e.g., Narina Nunez et al., *The Testimony of Elderly Victim/Witnesses and Their Impact on Juror Witnesses: The Importance of Examining Multiple Stereotypes*, 23 LAW & HUM. BEHAV. 413 (1999).

¹²⁹ See, e.g., *Callins v. Collins*, 510 U.S. 1141, 1148 (1994) (order denying certiorari) (Blackmun, J., dissenting) ("Furman demanded that the sentencer's discretion be directed and limited by procedural rules and objective standards in order to minimize the risk of arbitrary and capricious sentences of death."); *Gregg*, 428 U.S. at 189 (stating that capital procedures must seek to "minimize the risk of wholly arbitrary and capricious action").

¹³⁰ See William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1487-1503 (1998). Professor Bowers and his colleagues found that 48.3% of the 864 capital jurors surveyed, drawn from seven states, had predetermined life or death by the conclusion of the guilt stage, with 28.6% electing death and 19.7% life (51.7% were undecided). *Id.* at 1488 & tbl.1. Moreover, most jurors who took early stands persisted in their views to the final sentencing determination. *Id.* at 1491-94; see also Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1220 (1995) (stating "the data reveal quite dramatically that . . . the majority of jurors reach their decisions about guilt and punishment at the same time").

¹³¹ Pro-death witnesses for the State, especially the victim's survivors, benefit not just from the inprimatur of the State, but also from the natural empathic fealty jurors have for the victim, as opposed to the defendant they just found guilty of murder. See generally FLETCHER, *supra* note 1, at 203 (stating "[a] primary function of punishment . . . is to express solidarity with the victim"); see also Markus D. Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 17 LAW & HIST. REV. 114, 144 (1998) (noting "[t]oday, the gap between judge and judged . . . runs wide and deep . . . Empathic identification is limited to victims and considered beyond the pale for violent offenders."); Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1469 (1997) (observing "most capital juries will be terribly frightened by defendants, and provoked to punitive and vengeful feelings, long before they are exposed to any other information about them"); James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM.

Exacerbating this situation further still is the widespread tendency of capital jurors to disavow the onus of responsibility with regard to death decisions.¹³² For jurors so inclined, deference to the emotional plea of a witness would likely have significant attraction.

Moreover, even presuming that sentence opinion testimony enjoyed constitutional merit, it should be barred because of its highly questionable probative value. In *Payne*, for instance, not even the Tennessee prosecutor could have seriously contended that he could divine with certainty the type of punishment young Nicholas (then four years old) would recommend when mature enough to entertain such an opinion. What if Nicholas grew up to be a staunch opponent of the death penalty, yet Pervis Payne was condemned to death and executed in the intervening years? Would "justice" have been served under such circumstances?¹³³ Simply put, the stakes are too high in death penalty cases for outcomes to be driven by the unpredictable and highly inflammatory desires of witnesses' opinions on the key issue before the sentencer.¹³⁴

J. CRIM. JUST. 1, 5-6 (1995) (stating "there is clearly no direct way for a jury to help the victim or the victim's family. An indirect way, however, is to punish the defendant").

¹³² See, e.g., Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing*, 44 BUFF. L. REV. 339 (1996); Joseph H. Hoffman, *Where's The Buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995); Steven J. Sherman, *The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law*, 70 IND. L.J. 1183 (1995).

¹³³ As Professor George Fletcher has written: "Why, after all, should young Nicholas grow up and feel that if Payne merely received a long prison sentence justice was not done?" See FLETCHER, *supra* note 1, at 200. Indeed, numerous studies highlight that crime victims are not as harshly punitive as otherwise reflexively presumed. See, e.g., Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality*, 18 J. CRIM. JUST. 19, 25 (1990) (citing studies); Tobolowsky, *supra* note 6, at 84-85 (1998) (same).

¹³⁴ Elsewhere, I have argued that such sentiments should be acceded to, but under distinctly different circumstances: only at the charging stage and when the victim has executed a "declaration of life," a notarized document requesting that, should the signer be murdered, that the State exercise mercy in its threshold decision whether to seek the death penalty. See Wayne A. Logan, *Declaring Life at the Crossroads of Death: Victims' Anti-Death Penalty Views and Prosecutors' Charging Decisions*, 18 CRIM. JUST. ETHICS 41 (Fall 1999). I argue that the moral, social, and legal value American society attaches to autonomous decision making, at least with respect to the exercise of mercy by the State, compels that the murder victim's expressly memorialized wishes be deferred to at the charging stage. See *id.* at 48-49.

At the charging stage, the prosecutor makes a threshold determination on a case-by-case basis of whether to submit the death decision to the sentencing authority—the "conscience of the community"—and enjoys virtually unlimited discretion in whether death should be pursued. See, e.g., *Simpson v. State*, 6 S.W.3d 104, 107 (Ark. 1999) (utilizing "arbitrary and capricious" standard of review in challenge to prosecutor's capital charging discretion). See also generally Rory K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 440-45 (1999)

C. Usurpation of the Sentencing Authority's Role

A final concern stems from the reality that opinion testimony not merely distracts the sentencing authority from its constitutional duty to weigh only relevant factors, but actually usurps its fundamental mission. It is the job of the sentencer—whether judge or jury—to “express the conscience of the community on the ultimate question of life or death.”¹³⁵ In *McClesky v. Kemp*, the Court characterized this function as follows:

The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant [I]t is the jury's function to make the difficult and uniquely human judgments that defy codification and buil[d] discretion, equity, and flexibility into a legal system.¹³⁶

Sentence opinion testimony usurps this critical responsibility, insofar as it urges the sentencer to defer to the personal views of individual witnesses, at the expense of constitutionally recognized aggravating and mitigating evidence.¹³⁷ As the Tenth Circuit has noted: “Because the offense was committed against the community as a whole . . . only the community, speaking through the jury, has the right to determine what punishment should be administered.”¹³⁸ In *Huertas*, the Ohio Supreme Court expressed this identical concern, stating that opinion

(discussing broad discretionary power of federal prosecutors in capital charging decisions). At the sentencing juncture, however, a different constellation of goals is at play. See *Gregg*, 428 U.S. at 199 (distinguishing differing goals of charging versus sentencing decisions). Indeed, this difference is reflected in separation of powers analysis, with the judiciary possessing significant oversight powers in the post-charge, but not pre-charge, realm. See James M. Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1537-43 (1981) (discussing same). More importantly, it is at sentencing that the inherently difficult, ultimate decision must be made, a decision most often carried out by jurors highly susceptible to the emotion-laden opinions of others. For reasons discussed here, the admission of irrelevant, highly arbitrary opinion testimony has no place in the intensely individualized decision that must be made in this context.

¹³⁵ *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); see also *Gregg*, 428 U.S. at 184 (stating that imposition of the death penalty “is an expression of the community's belief that certain crimes are so grievous . . . that the only adequate response may be the death penalty”). See generally Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2420-27 (1999) (examining origin and purpose of “conscience of community” command).

¹³⁶ 481 U.S. 279, 311 (1987).

¹³⁷ See *United States v. Ness*, 665 F.2d 248, 250 (8th Cir. 1981) (noting the danger that “the jury could easily accord too much weight to the pronouncement of a lay witness . . . whose statement could be charged with . . . emotionalism”).

¹³⁸ *Robison*, 829 F.2d at 1505.

testimony "in a capital case violate[s] the defendant's constitutional right to have the sentencing decision made by the judge or the jury."¹³⁹ In effect, as *Huertas* concluded, witness opinions impermissibly and inexorably "go to the ultimate issue" before a jury, usurping the sentencing authority's function in a capital trial.¹⁴⁰

D. *A Response to the Cynics*

The prohibition advocated here is potentially vulnerable to at least two arguments. The first is one already evidenced in judicial rationales, namely: What is the point of barring opinion testimony, when the views of witnesses (whether for the prosecution or defense) likely can be readily surmised by the sentencer?¹⁴¹ While perhaps realistic, this recognition does not justify admission of sentence opinion testimony. Indeed, there is the converse inference: Why is such testimony warranted if it can be forecasted? To permit it under such circumstances smacks of excessiveness and arbitrariness, the very threats that the Court has endeavored to guard against since *Furman* and *Gregg*.¹⁴² Furthermore, because the testimony typically comes from a distraught witness, it is all the more problematic, serving to take the death decision making process even further beyond the intended realm of a "reasoned moral response" to the defendant and the crime of conviction.

A second argument derives from the confounding procedural dynamic of modern capital trials themselves: How can sentence opinion testimony be meaningfully distinguished from other, already permitted forms of testimony that bear striking resemblance to it? For instance, with respect to the defense, courts regularly allow "pleas for mercy" by defense witnesses.¹⁴³ Allocution, when the capital defen-

¹³⁹ See 553 N.E.2d at 1060.

¹⁴⁰ See *id.* at 1064; see also *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983) (stating "[q]uestions that would merely allow the witness to tell the jury what result to reach are not permitted").

¹⁴¹ See *supra* notes 86-88 and accompanying text.

¹⁴² See *Gregg*, 428 U.S. at 189 (stating capital procedures should endeavor to "minimize the risk of wholly arbitrary and capricious action").

¹⁴³ See, e.g., *State v. Hines*, 938 P.2d 388, 406 (Cal. 1997) (noting aunt "expressed her love for defendant, and asked the jury not to sentence him to death"); *State v. Barnes*, 496 S.E.2d 674, 688 (Ga. 1998) (deeming it "reversible error to prevent a friend or relative of the defendant from taking the stand and pleading with the jury for mercy"); *Cofield v. State*, 274 S.E.2d 530, 542 (Ga. 1981) (stating "[w]e are unwilling to foreclose a defendant seeking to avoid the imposition of the death penalty from appealing to the mercy of the jury by having his parents testify briefly to their love for him. The state frequently uses members of the victim's family for no different purpose."); *State v. Simmons*, 944 S.W.2d

dant himself addresses the sentencing authority on the question of death, inevitably bears close similarity as well.¹⁴⁴ Prosecutors, for their part, are permitted to express their personal view that death is warranted, so long as the "opinion is based on the evidence adduced at trial."¹⁴⁵ Finally, what is the point of barring sentence opinion testimony when *Payne* already has opened the emotional floodgates with respect to survivor testimony?

Plainly, to distinguish sentence opinion testimony from the tangled mass of kindred testimony now otherwise allowed in capital trials presents a significant line-drawing challenge. In the end, the only identifiable distinction might well turn on the quality of the testimony insofar as it comes in the form of an express recommendation for the sentencer to follow, as opposed to an allowable inference. However difficult, distinctions can and must be made in this extremely subtle yet high-stakes decisional enterprise.¹⁴⁶ Indeed, the emotionalism

165, 189 (Mo. 1997) (en banc) (noting "mother's plea for mercy" as mitigation strategy); *State v. DiFrisco*, 645 A.2d 734, 771 (N.J. 1994) (upholding trial court's decision to permit mother of defendant, but not his siblings, to plead for mercy and adding that it "may not agree" with preclusion of the siblings' testimony); *State v. Woodward*, 623 N.E.2d 75, 82 (Ohio 1993) (noting defendant's mother and sister testified that "they love appellant, and both requested that he be spared the death penalty," but assigning testimony "little or no weight in mitigation"); see also James R. Acker & Charles Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. LAW BULL. 299, 308-09 (1994) (noting "even the most unforgiving statutes inevitably are tempered by mercy in application Even if it were possible to exclude mercy from capital punishment hearings statutorily, it would be imprudent to do so.").

¹⁴⁴ See, e.g., *Homick v. State*, 825 P.2d 600, 604 (Nev. 1992) (holding "capital defendants in the State of Nevada enjoy the common law right of allocution [before the jury]"); *DiFrisco*, 645 A.2d at 757 (stating "the purpose of allocution is two-fold. First, it reflects our commonly-held belief that our civilization should afford every defendant an opportunity to ask for mercy. Second, it permits a defendant to impress a jury with his or her feelings of remorse."); *State v. Lord*, 822 P.2d 177, 216 (Wash. 1991) (upholding right of defendant to make unsworn plea for mercy to jury); see also J. Thomas Sullivan, *The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation*, 15 N.M. L. REV. 41 (1985); Caren Myers, Note, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity*, 97 COLUM. L. REV. 787 (1997).

Indeed, the New Jersey Supreme Court has justified the admission of victim impact evidence itself in part because of the availability of allocution to capital defendants. See *State v. Muhammad*, 678 A.2d 164, 182 (N.J. 1996).

¹⁴⁵ See *People v. Frye*, 959 P.2d 183, 255 (Cal. 1998). But see MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(c)(4) (stating "a lawyer shall not . . . assert his professional opinion as to the justness of a cause").

¹⁴⁶ See, e.g., *People v. Ochoa*, 966 P.2d 442, 505-06 (Cal. 1998) (distinguishing testimony from defendant's family on the toll an execution would have, permissible as "indirect" evidence of defendant's background and character, from basis to garner sympathy for family, the latter an improper mitigator); *Childs v. State*, 357 S.E.2d 48, 60 (Ga. 1987) (distinguishing defense witnesses' pleas for mercy from sentence opinion testimony insofar as

sanctioned by *Payne* in particular makes it all the more crucial that the law be vigilant in its effort to preserve what remains of the "reasoned moral response" once thought intrinsic to death decision making.

CONCLUSION

For reasons largely attributable to the success of the victims' rights movement, the justice system—and death penalty litigation in particular—have become increasingly personalized.¹⁴⁷ This Article has focused on one particular aspect of this evolution, that of witnesses in capital sentencing proceedings offering their opinions on whether convicted murderers should be put to death. For the reasons discussed, so long as capital prosecutions continue to proliferate in number across the nation, sentence opinion testimony will continue to make its way into the death decision making process. In the face of this inevitability, this Article has advanced several compelling reasons why, once and for all, the Supreme Court should impose an unequivocal, bright-line rule prohibiting opinion testimony in capital sentencing proceedings, a forum that can ill afford the additional arbitrariness that the testimony indisputably threatens.

former embodies a wish and the latter an opinion on the result the jury "ought" to reach, effectively usurping the jury's function); *State v. Johnson*, 525 S.E.2d 519, 525 (S.C. 2000) (same).

¹⁴⁷ Consistent with this evolution, academic commentators of late have urged that there occur a fundamental re-thinking of the traditional theoretical models used to conceptualize the criminal process. See, e.g., Beloof, *supra* note 101, at 326-27 (arguing for a "third model," the "Victim Participation Model," to compliment Professor Packer's traditional "Crime Control" and "Due Process" models); Tatjana Hornle, *Distribution of Punishment: The Role of a Victim's Perspective*, 3 BUFF. CRIM. L. REV. 175 (1999) (arguing for an "objective victim's perspective" in sentencing); William T. Pizzi, *Victims' Rights: Rethinking Our Adversary System*, 1999 UTAH L. REV. 349 (arguing for a "multi-sided" approach to criminal process).